

Is "Terrorism" Worth Defining?

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The search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail: periodically, eager souls set out, full of purpose, energy and self-confidence, to succeed where so many others before have tried and failed. Some, daunted by the difficulties and dangers along the way, give up, often declaring the quest meaningless. Others return claiming victory, proudly bearing an object they insist is the real thing but which to everyone else looks more like the same old used cup, perhaps re-decorated in a slightly original way. Still others, soberly assessing the risks, costs and benefits attendant upon the attempt, never set out at all, preferring to devote their energies to humbler but possibly more practical tasks. But the long record of frustrations and failures often seems to spur further efforts; the 99th Congress, for example, saw a dozen bills containing various attempts at legislative definitions of terrorism.¹

All those who have sought to define terrorism legally, in both the international and U.S. settings, have taken one of two paths. One path leads toward the elaboration of an analytical, generic definition, complete within itself, into which all "terrorist" acts would then fit—a "top-down" or deductive approach. The other path carves out a series of narrow, self-contained, sharply defined categories of acts that together compose an open-ended framework for defining (often implicitly) and suppressing terrorism — a "ground-up" or inductive approach. In order to assess the relative efficacy of these two methods in providing a definitional foundation for the construction of legal mechanisms to suppress terrorism, this discussion will survey and analyze selected international and U.S. efforts to define terrorism in a legally operative context.

I. INTERNATIONAL EFFORTS

The first organized international legal attempt to grapple with the problem of defining terrorism came in the series of conferences collectively known as the International Conferences for the Unification of Penal Law, which were held in various European capitals during the 1920s and 1930s. Most notably, the Sixth (Copenhagen) Conference in 1935 adopted a model penal provision on terrorism—the key articles of which covered a series of acts including "wilful acts directed against the life, physical integrity, health or freedom" of

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1. See *infra* Part II.

various officials, "causing a disaster" by "impeding" or "interrupting" transport or utility services, "wilful destruction of . . . public buildings," "wilful use of explosives in a public place," or "any other wilful act which endangers human lives and the community," where any of these acts "has endangered the community or created a state of terror calculated to cause a change in or impediment to the operation of the public authorities or to disturb international relations."²

This prewar international effort to establish a legal regime for the suppression of terrorism culminated in the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism.³ Article 1(2) of this Convention defines "acts of terrorism" as "criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public." To be subject to the Convention, an act had to be (1) an "act of terrorism" within the meaning of Article 1(2); (2) directed against a party to the Convention; and (3) one of the enumerated acts set out in Articles 2 and 3, which included "any wilful act causing death or grievous bodily harm or loss of liberty" to certain categories of public officials, "wilful destruction of, or damage to, public property," or "any wilful act calculated to endanger the lives of members of the public."

The imprint of the Conference draft provision on the 1937 Convention is evident. While the Conference text goes into much more detail about the covered offenses than the Convention, extending even to such esoterica as "propagating or provoking . . . epizootic or epiphytic diseases" (Article 2(1)), the main difference between them is terminological rather than substantive. The Conference draft distinguishes the offenses subject to its coverage by their common effect of "endanger[ing] the community or creat[ing] a state of terror." The Convention similarly pulls together a list of offenses by reference to their common qualities; in doing so, however, it inserts the additional step of explicitly labelling the acts so grouped as "terrorism," and making the applicability of that label a pre-condition for the applicability of the Convention itself.⁴

As international concerns about terrorism re-emerged in the 1970s, the United Nations began to devote specific attention to the

2. Sixth International Conference for the Unification of Penal Law, Copenhagen, Aug. 31-Sept. 3, 1935, *Actes de la Conference, 1938*, 420, reprinted in M. BASSIOUNI, INTERNATIONAL TERRORISM AND POLITICAL CRIMES 472 (1975). Other articles of the draft text covered such matters as conspiracy, incitement, and assistance.

3. League of Nations Doc. C.546.M383.1937.V. (1937). This convention, which was signed by 23 states, ratified by one (India), and acceded to by one (Mexico), never entered into force.

4. It also, not surprisingly for a document negotiated by official representatives of States rather than drawn up by an international gathering of jurists, adds the conjunctive requirement that the acts in question be "directed against a State" and omits the disjunctive requirement of "endangering the community."

issue. Part of that process was the United States 1972 Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism,⁵ put forward in the Sixth Committee of the U.N. General Assembly. The word "terrorism" appeared nowhere in the operative text of the draft Convention. Rather, Article 1 defined an "offense of international significance" as one committed 1) with intent to "damage the interests of or obtain concessions from a State or an international organization," 2) under certain enumerated transnational circumstances,⁶ 3) consisting of unlawfully killing, causing serious bodily harm, or kidnapping another person (including attempts and complicity in such acts) and 4) "committed neither by nor against a member of the armed forces of a State in the course of military hostilities."

Like the 1937 League of Nations Convention, the 1972 U.S. Draft Convention defines a class of offenses that will be subject to its operation. At the heart of the definition in both cases is an element of *intent*: in the 1937 Convention, "to create a state of terror in the minds of particular persons, or a group of persons or the general public;" in the 1972 Draft, "to damage the interests of or obtain concessions from a State or an international organization." Rounding out the definition in each instrument are two other kinds of elements: *substantive* (1937 Convention: consisting of one of the acts enumerated in Articles 2 and 3 (see *supra*); 1972 Draft: consisting of unlawfully killing, causing serious bodily harm, or kidnapping (including attempts and complicity)), and *jurisdictional* (1937 Convention: directed against a State Party; 1972 Draft: committed under the transnational circumstances enumerated in Article 1(a) and (b) (see note 6, *supra*)). Except for the 1937 Convention's use of the "terrorism" label to characterize acts meeting its intent requirement (a usage that the 1972 Draft avoids by means of the neutral term "offense of international significance"), the two are structurally quite similar, though the content each gives to its structural elements differs substantially.

The General Assembly Resolution on international terrorism that emerged from the Sixth Committee process (the same process in which the U.S. Draft Convention was advanced) established an *Ad Hoc* Committee on International Terrorism to "consider the observations of States" and "submit its report with recommendations for possible co-operation for the speedy elimination of the problem . . . to the General Assembly."⁷ The *Ad Hoc* Committee set up three Sub-

5. U.N. Doc. A/C.6/L.850 (1972).

6. That the act "(a) Is committed or takes effect outside the territory of a State of which the alleged offender is a national; and (b) Is committed or takes effect (i) Outside the territory of the State against which the act is directed, or (ii) Within the territory of the State against which the act is directed and the alleged offender knows or has reason to know that a person against whom the act is directed is not a national of that State[.]"

7. G.A. Res. 3034, 27 U.N. GAOR Supp. (No. 30) at 119, U.N. Doc. A/RES/3034 (1972), paras. 9, 10.

Committees of the Whole, one of which was concerned with the definition of international terrorism.

Conceptual unanimity eluded the *Ad Hoc* Committee. The Non-Aligned Group's proposed definition of acts of international terrorism, though not intended to possess legal significance and certainly not constrained by any known principles of legal draftsmanship, nonetheless indicated, when compared with the U.S. Draft Convention, the depth of the obstacles in store for any real effort in the U.N. context to achieve an agreed legal definition. The Group would have included in the term "international terrorism":

- (1) Acts of violence and other repressive acts by colonial, racist and alien regimes against peoples struggling for their liberation . . . ;
- (2) Tolerating or assisting by a State the organizations of the remnants of fascist or mercenary groups whose terrorist activity is directed against other sovereign countries;
- (3) Acts of violence committed by individuals or groups of individuals which endanger or take innocent human lives or jeopardize fundamental freedoms. This should not affect the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and the legitimacy of their struggle . . . ;
- (4) Acts of violence committed by individuals or groups of individuals for private gain, the effects of which are not confined to one State.⁸

As contrasted with the 1937 League of Nations Convention and the 1972 U.S. Draft Convention, in this definition the explicit intent element, to the extent it is there, has been turned on its head: private gain, as opposed to political motivation, is now the determining factor. The substantive element has been drastically expanded to include "repressive" acts, not just violent ones, in the first paragraph; "tolerating or assisting" terrorist activities in the second paragraph; "acts of violence . . . which endanger or take innocent human lives or jeopardize fundamental freedoms" in the third paragraph; and simply "acts of violence" in the fourth paragraph. In addition, a new emphasis is given to the identity of the perpetrator. In the first paragraph, not just any act of violence or other repressive act qualifies; the act in question must be carried out by a "colonial, racist [or] alien regime." In the second paragraph, the "tolerating or assisting" must be undertaken "by a State." The "acts of violence" referred to in the third and fourth paragraphs must be committed "by individuals or groups of individuals." Finally, a jurisdictional element of sorts is present in the fourth paragraph ("effects of which are not confined to one State").

The Non-Aligned Group's proposed definition reflects a distinct conceptual basis: terrorism is not merely a special category of indi-

8. 28 U.N. GAOR Supp. (1973), reprinted in M. BASSIOUNI, *supra* note 2, at 564.

vidual criminality to be handled in a politically neutral fashion by cooperating states; it is fundamentally a political problem that arises from the actions of States, to be addressed by de-legitimizing certain categories of acts committed by certain States.⁹ The fundamental conceptual divisions revealed in this early product of the *Ad Hoc* Committee persisted throughout its six-year lifetime.¹⁰

Notwithstanding the failure of the international community to agree in the United Nations on a definition of terrorism that could serve as the basis of a general legal instrument for its suppression, some progress in this area has been achieved through another method: the conclusion of a series of individual conventions that specify certain limited categories of offenses implicitly considered "terrorist"—without attempting to define or even employ that term—and impose the requirement of *aut dedere, aut judicare* with respect to such offenses. In these instances the intent element has been set aside in favor of sharply narrowed and highly elaborated substantive and jurisdictional elements as a means of defining the various types of offenses to which the particular instrument will apply.

Thus, aircraft hijacking,¹¹ aircraft sabotage,¹² crimes against internationally protected persons,¹³ hostage-taking,¹⁴ and crimes involving nuclear materials¹⁵ have all been subjects of conventions which define the covered offenses in substantive terms and establish a jurisdictional framework within which the convention will apply to these offenses.¹⁶ Prototypical of this group of treaties is the 1970 Hague Convention on aircraft hijacking, Article 1 of which states that:

Any person who on board an aircraft in flight:

(a) unlawfully, by force or threat thereof, or by any other form of

9. For further discussion of this point see Frank & Lockwood, *Preliminary Thoughts Towards an International Convention on Terrorism*, 68 AM. J. INT'L L. 69, 73 (1974).

10. See Report of the *Ad Hoc* Committee on International Terrorism, 34 U.N. GAOR Supp. (No. 37), U.N. Doc. A/34/37 (1979); for a more comprehensive discussion of this history see Note, *An Analysis of the Achille Lauro Affair: Towards an Effective and Legal Method of Bringing International Terrorists to Justice*, 9 FORDHAM INT'L L.J. 328, 352 (1986).

11. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192 [hereinafter Hague Convention].

12. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570 [hereinafter Montreal Convention].

13. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532 [hereinafter IPP Convention].

14. Convention Against the Taking of Hostages, Dec. 17, 1979, 18 INT'L LEGAL MATERIALS 1457 (1979) [hereinafter Hostages Convention].

15. Convention on the Physical Protection of Nuclear Materials, Oct. 26, 1979, 18 INT'L LEGAL MATERIALS 1419 (1979) [hereinafter Nuclear Materials Convention].

16. For a concise discussion of these conventions see J. MURPHY, PUNISHING INTERNATIONAL TERRORISTS 9-11 (1985).

intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or

(b) is an accomplice of a person who performs or attempts to perform any such act

commits an offense¹⁷

Article 3 supplements this statement of the offense with a definition of "in flight" (subparagraph 1),¹⁸ and establishes the Convention's jurisdictional limits in various situations.¹⁹

This Hague Convention structure proved resilient, being adopted, *mutatis mutandis*, in all of the other international "anti-terrorism" conventions mentioned above. The approach to the legal suppression of international terrorism these conventions have taken is essentially inductive, in contrast to the basically deductive approach of the 1937 League of Nations Convention and the 1972 U.S. Draft Convention. This contrast highlights an important advantage of the inductive method: it avoids political conflict over basic definitional principles (though not political conflict entirely, as the negotiating histories of the IPP and Hostages Conventions attest²⁰), permitting textual agreement to be reached.

The 1977 European Convention on the Suppression of Terrorism²¹ represented a triumph of sorts for the inductive approach. In this instrument the term "terrorism" found its way into the title and preamble, but no further. Instead, the Convention's substantive scope was defined by reference to a list of five specific types of offenses.

17. Hague Convention, *supra* note 11, 22 U.S.T. at 1644.

18. *Id.*

19. The remainder of Article 3 is as follows:

2. This Convention shall not apply to aircraft used in military, customs or police services.

3. This Convention shall apply only if the place of take-off or the place of actual landing of the aircraft on board which the offence is committed is situated outside the territory of the State of registration of that aircraft; it shall be immaterial whether the aircraft is engaged in an international or domestic flight.

4. In the cases mentioned in Article 5 [aircraft of joint or international registration], this Convention shall not apply if the place of take-off and the place of actual landing of the aircraft on board which the offence is committed are situated within the territory of the same State where that State is one of those referred to in that Article.

5. Notwithstanding paragraphs 3 and 4 of this Article, Articles 6 [custody over an alleged offender], 7 [extradite-or-prosecute requirement], 8 [extradition generally] and 10 [judicial assistance] shall apply whatever the place of take-off or the place of actual landing of the aircraft, if the offender or the alleged offender is found in the territory of a State other than the State of registration of that aircraft.

Id. at 1644-45.

20. See Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 901, 915-18 (1985).

21. Jan. 27, 1977, Europ. T.S. No. 90 [hereinafter European Convention]. For a more comprehensive discussion of this Convention see J. MURPHY, *supra* note 16, at 13.

The first four of these offenses correspond respectively to the categories of offenses covered by the Hague, Montreal, IPP, and Hostages Conventions—in the former two cases by specific citation, in the latter two by substantive description.²² The fifth category was "an offense involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons."²³ Thus, the European Convention represents a legal "definition" of terrorism as an enumerated series of specific criminal acts. Moreover, this legal definition is without any explicit linkage of the acts thus enumerated through any common characteristics or elements such as intent or motive, identity of actor, or identity of victim.²⁴

II. U.S. EFFORTS

As U.S. concern over international terrorism mounted in the early and mid-1970s, Congress began to consider legislative approaches to the problem. An important outgrowth of such consideration was the 1978 "Act to Combat International Terrorism."²⁵ This bill, which contained a wide variety of authorities in the areas of economic sanctions, foreign airport security, aircraft sabotage and piracy, and nuclear material security, sets forth a definition of "international terrorism." This definition includes any act designated as an offense under the Hague, Montreal and IPP Conventions, as well as "any other unlawful act which results in the death, bodily harm, or forcible deprivation of liberty to any person, or in the violent destruction of property, or an attempt or credible threat to commit any such act," under specified transnational circumstances similar to those set forth in the 1972 U.S. Draft Convention,²⁶ when the act was "intended to damage or threaten the interests of or obtain concessions from a state or an international organization,"²⁷ with a military exception also similar to that in the 1972 U.S. Draft.²⁸ This definition, unlike that of the 1972

22. European Convention, Art. 1 (*cited in* J. MURPHY, *supra* note 16, at 13). The Hostages Convention, of course, had not yet been concluded at this time, though it had been formally proposed.

23. *Id.*

24. The Supplementary Treaty Concerning the Extradition Treaty Between the Government of the United States of America and the Government of the Kingdom of Great Britain and Northern Ireland, Signed at London on 8 June 1972, June 25, 1985, Treaty Doc. 99-8, 99th Cong., 1st Sess. (1985), which was based on the European Convention, is a recent example of the application of this approach. A number of amendments not pertinent to this discussion were proposed by the Senate Foreign Relations Committee following its review of the treaty, 132 CONG. REC. S9120 (daily ed. July 16, 1986).

25. S. 2236, S. REP. NO. 908, 95th Cong., 2d Sess. 91 (1978).

26. *Id.* at § 3(a)(4). For relevant text of the 1972 U.S. Draft Convention see *supra* note 6. The one addition in S. 2236 to the circumstances outlined in the 1972 Draft was subsection 3(a)(4)(D): "within the territory of any state when found to have been supported by a foreign state, irrespective of the nationality of the alleged offender."

27. *Id.* at § 3(a)(4)(i).

28. This exception reads as follows: "Provided, That the act of international terrorism is . . . not committed in the course of military or paramilitary operations

U.S. Draft and the others discussed in the preceding section, is not geared to the establishment of a universe of covered offenses to be subject to a special legal regime such as *aut dedere, aut judicare*. Instead, it emphasizes certain congressional reporting requirements, and the imposition of economic sanctions against states that support terrorism. Nevertheless, this definition, when compared with those mentioned above, is structurally similar. It represents, in fact, a combination of the inductive and deductive approaches, containing both a list of offenses denoted by specific reference to the relevant convention and a generic description of acts linked by their common intent, substantive, and jurisdictional elements.

While the 1978 "Act to Combat International Terrorism" did not become law, the same year saw the enactment of the first (and as of this writing, still the only) statutory definition of "terrorism" in U.S. federal law. This came in the Foreign Intelligence Surveillance Act of 1978:²⁹

International terrorism means activities that--

- (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;
- (2) appear to be intended--
 - (A) to intimidate or coerce a civilian population;
 - (B) to influence the policy of a government by intimidation or coercion; or
 - (C) to affect the conduct of a government by assassination or kidnapping; and
- (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.³⁰

Structurally the same elements are present in the FISA definition as in the other deductive definitions discussed in the preceding section, with subsection (1) containing the substantive element, (2) the intent element, and (3) the jurisdictional element. As is characteristic of this type of definition, the substantive element is quite broad; the focus is on the intent element as the key to distinguishing what is "terrorist" about the covered acts. In this case, the intent element is drafted so vaguely as to leave the entire definition almost nebulous;³¹ this is acceptable because in the context of FISA the defi-

directed essentially against military forces or military targets of a state or an organized armed group." *Id.* at § 3(a)(4)(ii).

29. Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. § 1801 (1982)) [hereinafter FISA].

30. FISA, *supra* note 29, at § 101(c), 50 U.S.C. § 1801(c). Paragraphs (1) and (2) of this subsection were repeated in the definition of "act of terrorism" employed in the Attorney General's terrorism reward authority, 18 U.S.C.A. § 3077 (West 1985).

31. What entities, for instance, would fall within the term "civilian population" in subparagraph 2(A)? The entire population of a given country? The populations of sev-

dition has no penal or foreign policy significance, serving only as a predicate for the application of the special electronic surveillance regime established by the Act.³²

This consideration did not, however, inhibit legislative drafters from using the FISA definition as a model in later bills that certainly were intended to have penal or foreign policy significance, or both. The 99th Congress saw numerous such proposals. S. 275 (the "Anti-terrorism Act of 1985"), for instance, aimed to "protect the internal security of the United States by creating the offense of terrorism,"³³ providing for various criminal penalties up to and including death for the commission, or for procuring, attempting or threatening the commission, of an act of "terrorism . . . within the United States or any State, territory, possession, or district."³⁴ The definition of the criminal offense "terrorism" is taken practically verbatim from FISA, minus the latter's jurisdictional element.³⁵ Several other proposed criminal laws used this device as well, in most cases including the FISA jurisdictional element along with the substantive and intent elements in order to reach acts of "international" terrorism committed outside the United States in addition to, or instead of, acts within U.S. territorial jurisdiction.³⁶ One such bill did not even bother to repeat the FISA language, but defined the offense simply by citing the relevant section of FISA itself.³⁷ Other penal law drafters were slightly more creative, attempting to adapt the FISA definition to their purposes by adding or subtracting certain ingredients to or from the basic model. Thus, the definition of the terrorism offense in H.R. 4294 (the "Antiterrorism Act of 1986") adopted all three of the FISA intent sub-elements verbatim but added a fourth: "to retaliate against or punish a government or a government official or employee for a policy or conduct of such government or official or employee."³⁸ H.R.

eral countries taken together? A particular organized group within a country, such as a church or labor union? A random assortment of civilians, such as the collection of persons who happen to be standing in a bank during an armed robbery? The legislative history is not particularly helpful on this or other potential internal problems of the FISA definition. See S. Rep. No. 511, 95th Cong., 2d Sess. 29, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 3904, 3931.

32. The FISA definition has been upheld against court challenges on grounds that it gives the judiciary unconstitutionally broad authority to make foreign policy, *United States v. Megahey*, 553 F. Supp. 1180, 1196 (E.D.N.Y. 1982), *aff'd*, 729 F.2d 1444 (1983) (the definition calls for "findings of objective fact"), and of overbreadth in first amendment terms, *United States v. Falvey*, 540 F. Supp. 1306, 1314 (E.D.N.Y. 1982) (FISA provisions "are not overbroad and unconstitutional on their face").

33. S. 275, 99th Cong., 1st Sess. (1985).

34. *Id.* at § 3(a).

35. *Id.* The only change from the corresponding FISA language is the singular "activity" vice the plural form.

36. See, e.g., S. 1940, 99th Cong., 1st Sess. § 3(a) (1985); S. 2414, 99th Cong., 2d Sess. § 1(b) (1986); H.R. 3565, 99th Cong., 1st Sess. § 2 (1985); H.R. 4125, 99th Cong. 2d Sess. § 2 (1986).

37. H.R. 4288, 99th Cong., 2d Sess. § 2(a) (1986).

38. H.R. 4294, 99th Cong., 2d Sess. § 2 (1986).

4294 also changed the jurisdictional element to stipulate that the covered criminal conduct take place outside the United States and be directed against the United States or a national of the United States.³⁹ H.R. 4786 (also the "Antiterrorism Act of 1986") similarly retained the basic content of the FISA definition, but condensed it considerably and changed the jurisdictional element along the lines of H.R. 4294:

- (a) Whoever coerces, intimidates, or retaliates against, or attempts or conspires to coerce, intimidate, or retaliate against, a government or a civilian population by an act of violence against—
- (1) a national of the United States; or
 - (2) the property or facilities of the United States or a national of the United States;
- shall be [punished as provided].⁴⁰

Bills directed at the foreign policy aspects of terrorism have also resorted to the FISA definition for inspiration. S. 1941 (the "International Terrorism Deterrence Act of 1985"), would, *inter alia*, provide a mechanism for the imposition of a wide range of economic, trade and aid sanctions against foreign states that support "international terrorism" — defined precisely as in FISA.⁴¹ Similarly, S. 2335, which would authorize the President to "undertake actions to protect United States persons against terrorists and terrorist activity through the use of all such anti-terrorism and counter-terrorism measures as he deems necessary," incorporates the FISA substantive and intent elements practically verbatim.⁴² One of the very few anti-terrorist legislative efforts in the 99th Congress that did not rely on FISA for its definitional content was H.R. 2781 (the "Act to Combat International Terrorism") — a foreign policy-oriented measure providing, *inter alia*, for sanctions against terrorism-supporting foreign states. H.R. 2781 turned instead to another historical source, the 1978 "Act to Combat International Terrorism,"⁴³ adopting the latter's substantive, intent, and jurisdictional elements almost wholesale.⁴⁴

The domination of 99th Congress anti-terrorism legislative efforts by the overworked FISA definition reached its apex in S. Res. 190, "[e]xpressing the sense of the Senate that the President should call for international negotiations to make international terrorism a universal crime prosecutable in the United States."⁴⁵ This resolution called upon the President to seek international negotiations "for the pur-

39. *Id.*

40. H.R. 4786, 99th Cong., 2d Sess. § 2(a) (1986).

41. S. 1941, 99th Cong., 1st Sess. § 6(2) (1985).

42. S. 2335, 99th Cong., 2d Sess. § 3 (1986). In order to constitute "terrorism" under this bill the activity must also be directed against United States persons and must be "committed by an individual who is not a national or permanent resident alien of the United States." *Id.*

43. *See supra* note 25 and accompanying text.

44. H.R. 2781, 99th Cong., 1st Sess. § 2(a) (1985).

45. S. Res. 190, 99th Cong., 1st Sess. (1985).

pose of agreeing on a definition of 'international terrorist crimes';⁴⁶ the definition that the resolution would have the international community adopt bears a close, and by now not unexpected, resemblance to that found in FISA. One wonders what the reaction of the drafters of section 101(c) of the Foreign Intelligence Surveillance Act would have been had they known that their product would, eight years later, be put forth in the Senate as the legal standard for defining the crime of terrorism, not just for the United States, but for the entire world.

Against this background it is noteworthy that the anti-terrorism penal legislation that actually emerged from the 99th Congress was informed essentially by the inductive approach — although with a novel deductive twist. Section 1202 of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, which amends Part I of title 18 of the U.S. Code by inserting a new chapter 113A entitled "Extraterritorial Jurisdiction Over Terrorist Acts Abroad Against United States Nationals," provides U.S. criminal jurisdiction over the killing of, or an act of physical violence with intent to cause serious bodily injury to or that results in such injury to, a U.S. national outside the United States.⁴⁷

In this statute the substantive and jurisdictional elements are clearly there, but there is no special intent element. As shown in part I *supra*, the absence of a terrorism-oriented intent element in the definition of the offense, as in the Hague, Montreal, IPP and Hostages Conventions, requires a relatively narrow, precise description of the substantive element if the definition as a whole is to retain its coherence. Yet, section 1202 has neither. It maintains its anti-terrorism focus by a novel device:

(e) LIMITATION ON PROSECUTION.—No prosecution for any offense described in this section shall be undertaken by the United States except on written certification of the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions that, in the judgment of the certifying official, such offense was intended to coerce, intimidate, or retaliate against a government or a civilian population.⁴⁸

The intent element — firmly rooted, to no great surprise, in FISA — has surfaced, not as an element of the offense itself, but as a limitation on prosecution of the offense. Thus, in the end, Congress resisted the numerous calls to define deductively a new offense of terrorism. Instead, Congress opted for an extension of extraterritorial jurisdiction over offenses the substance of which was already defined in

46. *Id.*

47. Omnibus Diplomatic Security and Antiterrorism Act of 1986, H.R. 4151, 99th Cong., 2d Sess., 132 CONG. REC. H5944, H5957 (daily ed. Aug. 12, 1986), Pub. L. No. 99-399 (1986).

48. 132 CONG. REC. at H5958.

the federal criminal code, stipulating at the same time that this new jurisdiction was only to be *exercised* in cases where the offense was committed with a terrorist-type political intent.⁴⁹

The preceding section of the same Act, however, goes in the opposite direction. Section 1201 expresses the sense of Congress that "the President should establish a process to encourage the negotiation of an international convention to prevent and control all aspects of international terrorism,"⁵⁰ and further stipulates that this convention should provide, *inter alia*, "an explicit definition of conduct constituting terrorism."⁵¹ Unlike its cousin, S. Res. 190,⁵² this section fails to supply future negotiators with guidance as to the actual content of such a definition. It looks as though in section 1201 Congress is asking the President to undertake for the entire world what Congress itself refrained in section 1202 from doing for the United States — to establish a deductive definition of terrorism in a penal law context — without even the dubious benefit of being furnished guidelines for the effort.

III. DISCUSSION

A. General

The two basic approaches to the problem of legally defining terrorism can be analyzed using the three kinds of definitional elements identified in the preceding discussion, namely substantive, jurisdictional, and intent-oriented.⁵³ The deductive method is characterized by the use of a fairly broad substantive element and a general, politically oriented intent element. This method aims to abstract the

49. Evidently wary of the inherent vagueness of the FISA intent standard (*see supra* note 31) — particularly objectionable in a criminal law context, even though the standard is not here technically an element of the offense — the conferees attempted to clarify it by the following report language: "The term 'civilian population' includes a general population as well as other specific identifiable segments of society such as the membership of a religious faith or of a particular nationality, to give but two examples. Neither the targeted government nor civilian population, or segment thereof, has to be that of the United States." 132 CONG. REC. at H5969.

50. *Id.* at H5957.

51. Omnibus Diplomatic Security and Antiterrorism Act of 1986, *supra* note 47, at subsection (c)(1). The previous year Congress had expressed its sense that the President should "establish a process" to negotiate "a viable treaty to effectively prevent and respond to terrorist attacks," which should "incorporate an operative definition of terrorism." International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 507, 99 Stat. 222.

52. *Supra* note 46.

53. It is recognized that some elements that have been advanced as part of legal definitions of terrorism do not necessarily fall explicitly into one of these three categories. In particular, the identity of the victim of an act, or of its perpetrator, may constitute a component of a definition. Indeed, in some cases this component is given a position of paramount importance. *See, e.g.*, R. FRIEDLANDER, TERROR-VIOLENCE: ASPECTS OF SOCIAL CONTROL 158, 167 (1983). Franck & Lockwood, *supra* note 9, at 72-82, advance a five-part categorization, adding identities of victim and perpetrator to the three elements adduced in the present article. Analytically, however, this does

generic qualities of "terrorism," covering a wide variety of criminal conduct, but only under certain circumstances — those described in the intent element. It usually, though not always,⁵⁴ employs the term "terrorism" explicitly, and strives for conceptual self-sufficiency, i.e. to set down a legal definition that will be valid once and for all.

The inductive method, on the other hand, relies upon a relatively precise description of the conduct constituting the substantive element and omits the political intent element that characterizes the deductive approach. This method makes no effort at abstraction, but covers a particular type of conduct that will trigger a given legal result without regard to political intent. The term "terrorism" is not employed in an operative context, though it may find its way into a preamble⁵⁵ or a title.⁵⁶ Finally, the inductive approach is open-ended, with no pretensions to definitiveness; new specific categories of conduct are always subject to coverage in subsequent instruments.

B. International

The inductive approach has clearly triumphed in the international legal arena. The reason is not hard to find. The fundamental conceptual differences among major segments of the international community — so starkly revealed in the work of the U.N. *Ad Hoc* Committee⁵⁷ — are intractable, and there is very little prospect of this situation ameliorating in the foreseeable future. The prospect of meaningful consensus on key elements of a deductive definition, in particular the substantive element (insofar as it relates to the state versus individual identity of the perpetrator) and the intent element (insofar as it relates to "political" versus "private" motivation), is thus extremely poor. Put simply, governments that have a strong political stake in the promotion of "national liberation movements" are loath to subscribe to a definition of terrorism that would criminalize broad areas of conduct habitually resorted to by such groups; and on the other end of the spectrum, governments against which these groups' violent activities are directed are obviously reluctant to subscribe to a definition that would criminalize their own use of force in response to such activities or otherwise. In this light the dictum "one man's terrorist is another man's freedom fighter" can be seen as a state-

not appear to constitute a separate element on the same level as the three used in this discussion; rather, it may form part of one of these three. Thus, it may come under the substantive heading, such that an act is only an offense in the first place if it is directed against certain categories of victims or carried out by certain categories of perpetrators. Or it may be part of the jurisdictional element, where the offense only comes within the jurisdiction of the given instrument if, for example, the victim is not a national of the state where the offense is committed. Or it may be part of the intent element, where the act is only an offense if it is intended to affect a particular type of entity, such as a "civilian population" or a government.

54. See *supra* note 5 and accompanying text.

55. As in the Hostages Convention, *supra* note 14.

56. As in the European Convention, *supra* note 21.

57. See *supra* notes 7-10 and accompanying text.

ment not so much of an inherent moral conundrum, but of an international political reality.⁵⁸

In contrast, the inductive approach can result in consensus on legal instruments for the suppression of terrorism. This is accomplished by focusing upon specific types of actions that — regardless of motivation or context — are either intrinsically morally repugnant and/or so clearly interfere with the conduct of international commerce and relations as to pose a potential threat to all states. Of course, the practical impact of such instruments may be small, as governments ignore or violate them with impunity; but at least through this approach it has proven possible to create the instruments in the first place, as a prerequisite to substantive progress in the effort to combat terrorism through legal means.

But the question of how to proceed further in the international arena is not thereby answered conclusively. Even with the relative progress achieved through the inductive method to date, and given that political realities at present and for the foreseeable future make success through the deductive method doubtful, we still must ask whether the potential benefits to be derived from such success would make the effort worthwhile. One prominent scholar in this area believes it would be, despite the difficulties he recognizes: "The world community has probably gone about as far as it can with the piecemeal approach to combatting terrorism; the time may have now come to consider a more comprehensive step."⁵⁹ Other authorities have expressed a preference for a continuation of the more modest inductive approach, primarily on grounds of feasibility.⁶⁰ Still others take the position that since just about any act that could conceivably be called "terrorist" is already a criminal offense under municipal legal systems — murder, arson, extortion, kidnapping, unlawful interference, and so on — there is no need for a generic definition of terrorism on the international level at all.⁶¹

But what would be the advantages of the deductive approach in the international setting? Such advantages could come on two levels: practical and moral-political. On the practical level, it could be said that it is simply more convenient, neater, and more efficient to encompass all acts of international terrorism in one instrument, rather than to go on endlessly extending the scope of the concept through successive separate conventions. But the significance of this benefit does

58. Cf. the characterization of "terrorism" offered by Soviet legal scholars, which includes, in addition to the more or less typical elements (act of violence, political motive, directed against a group of persons, classes, or a state), the peculiarly Leninist element of "the absence of an opportunity to achieve the declared . . . objective." I. BLISHCHENKO & N. ZHDANOV, *TERRORISM AND INTERNATIONAL LAW* 39 (1984).

59. J. MURPHY, *supra* note 16, at 129.

60. See Franck & Lockwood, *supra* note 9, at 89.

61. M. BASSIOUNI, *supra* note 2, at 486-87; R. FRIEDLANDER, *supra* note 53, at

not seem to justify the effort that would be necessary to employ this method successfully. Moreover, it is perfectly possible, as the European Convention shows,⁶² to employ the inductive method in a way that is convenient, neat, and efficient: one simply covers a wider variety of specific offenses in a single instrument.

So the possible practical advantages cannot constitute a sufficient reason to choose the deductive road. Only the potential moral and political benefits of a general legal instrument based on this approach would justify a serious effort to utilize it. Such results are self-evident, though rarely, if ever, explicitly recognized by the proponents of the deductive approach: a multilateral anti-terrorism legal instrument based on a generic definition of terrorism would in effect put the official international seal of disapproval on a whole range of violent political behavior, with a moral emphasis that the facially apolitical inductive approach lacks. Those who engage in such behavior would be effectively branded as international outlaws. This, in turn, could constitute an important step toward the goal of rendering terrorism an actually — as opposed to rhetorically — unthinkable device in international relations.

This is unquestionably a worthwhile goal. But the elaboration of a generic, deductive legal definition of terrorism is not necessarily a wise way to aim for it. In the first place, the special effort required to develop precise legal terminology serves merely to clarify and sharpen, not soften, the underlying political differences that exist between governments with regard to terrorism, as the experience of the U.N. *Ad Hoc* Committee shows. Further, from a strictly legal point of view, it may not be possible to develop a generic definition that will, with sufficient precision, cover all acts that should be covered and omit all acts that should be omitted. The problem here is inherent in the element that makes a generic definition possible in the first place — intent. In the context of terrorism this element must be characterized by reference to some political purpose: "directed against a State" (1937 League of Nations Convention);⁶³ "intended to damage the interests of or obtain concessions from a State or an international organization" (1972 U.S. Draft);⁶⁴ "for a political purpose" (1986 International Law Association Draft Articles on Extradition in Relation to Terrorist Offenses). But in many cases, it is simply impossible to determine whether an act of violence is directed against or intended to damage the interests of a State, or committed for a "political" purpose. Terrorists do not necessarily make explicit demands or openly reveal the ultimate target of their actions. Is a massacre carried out by extremist Palestinians at Zurich airport in which Swiss, German, Israeli and Libyan nationals are killed "directed against" a

62. See *supra* notes 21-24 and accompanying text.

63. See *supra* notes 3-4 and accompanying text.

64. See *supra* note 5 and accompanying text.

State? Which one? Or, was it done to kill a personal enemy of one of the gunmen, and others who were shot simply got in the way? What about a bomb on a French airliner somewhere over the Mediterranean Sea en route from Paris to Cairo that kills a Jordanian official and a British Member of Parliament, along with assorted other passengers of a dozen different nationalities? Was it done "for a political purpose," or did the saboteur have a grievance against Air France — or an insurance policy on her estranged husband who was a passenger on the flight? Most importantly, who will make these determinations when the time comes for the instrument's *aut dedere, aut judicare* obligation to be applied? The requesting state? The requested state? The International Court of Justice?

The inductive approach, while it lacks the sweeping potential moral-political benefits of the deductive approach, has, unlike the latter, the advantages of practicality as well as clarity — a hijacking is a hijacking, a hostage-taking is a hostage-taking. Of course, at the margin there is always room for interpretation, but the confusion, if any, is not inherent in the definition. Moreover, this approach is not without potential moral and political benefits of its own, albeit more modest ones. Surely it is morally and politically significant for there to exist an international consensus that aircraft hijacking, aircraft sabotage, attacks on diplomats, and hostage-taking constitute international crimes whose perpetrators should be denied sanctuary from prosecution for their acts, even if these acts are not explicitly labeled as terrorism and even if many other types of terrorist acts are not thereby covered. Finally, realism compels the recognition that if governments often do not live up to their obligations under these much more limited instruments, the chances of a decent record of observance of a generic anti-terrorism convention are even slimmer. In an environment of widespread non-observance of obligations under such a convention, any moral-political benefits it might have brought with respect to the overall struggle against international terrorism could be vitiated, and even reversed.

C. *United States*

In U.S. federal legislation the inductive approach has been strongly preferred. As the discussion in Part II *supra* showed, several proposals for the creation of a criminal offense of "terrorism," either domestic or international, have been unsuccessful. Similarly, in the foreign policy area, no generic definition of terrorism has become law, despite a number of proposals in this direction. It is only in a couple of very specific and narrow contexts — FISA and (using the same definition) the Attorney General's terrorism rewards authority⁶⁵ — that a legislative definition has been enacted. While this situation can hardly be traced to the same sort of conceptual and political div-

65. See *supra* note 30.

isions that have plagued international efforts, there has apparently been a realization in the United States as well that the drawbacks of the deductive approach outweigh its potential benefits.

In a penal setting, those drawbacks largely stem from the same basic problem discussed above with regard to international legal efforts: the inherent vagueness of any generic, "political" intent element. In the U.S. legal context, this flaw poses fundamental constitutional problems. The due process clause requires that criminal statutes "give a person of ordinary intelligence fair warning that his contemplated conduct is forbidden by the statute."⁶⁶ When first amendment concerns are also involved, as they would of necessity be in any statute that included a politically-oriented intent element, this requirement has even greater force.⁶⁷ Even were such problems somehow resolved, the breadth of a generic intent element would severely complicate the task of prosecutors, who would be required to prove beyond a reasonable doubt the presence of a particular political motivation.⁶⁸ Consequently, this would leave the Government open to accusations of selective prosecution based on the political views of defendants.⁶⁹ A separate but substantial problem would be the likely absence of a similar intent element in the penal law of extradition treaty partners, thus removing the factor of dual criminality, a prerequisite to extradition⁷⁰ — and one must wonder what the point would be of an international terrorism offense for which the United States could not successfully request the extradition of suspected offenders. Evidently, considerations of this nature ultimately led the 99th Congress to adopt an essentially inductive international terrorism penal law, as described in Part II *supra*.⁷¹

In the foreign policy area several laws now provide for sanctions of various types against foreign countries involved in international terrorism.⁷² In no case does such a law define "terrorism." The executive branch thus has the responsibility, within the limits imposed by

66. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972), and cases cited therein.

67. *See Ashton v. Kentucky*, 384 U.S. 195, 200 (1966).

68. *See Smith, Antiterrorism Legislation in the United States: Problems and Implications*, 7 TERRORISM 213, 221 (1984).

69. *See generally Epperson v. Arkansas*, 393 U.S. 97 (1968).

70. J. MURPHY, *supra* note 16, at 44.

71. Prior to the enactment of § 1202 of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, *supra* note 47, one commentator had called for a federal penal law employing a generic definition of terrorism. Paust, *Terrorism and "Terrorism-Specific" Statutes*, 7 TERRORISM 233, 234 (1984). Professor Paust responds to concerns of the type noted in the text above, some of which were brought out explicitly in a companion piece by Professor Smith, *supra* note 68, with the assertion that "a sufficiently descriptive definitional approach can alleviate the unwanted effects flowing from . . . overly broad statutory schemes." *Id.* Professor Paust's approach was supported by Professor Murphy, *supra* note 16, at 132-33, also prior to enactment of the new international terrorism law.

72. *See, e.g., International Security and Development Cooperation Act of 1985, supra* note 51, § 505, 22 U.S.C.A. § 2349aa-9 (West Supp. 1986) (authorizing the Pres-

the framework of the particular statute and by the basic congressional oversight power, of determining precisely what foreign government behavior will result in the application of these sanctions. This situation appears preferable to one in which a foreign government's actions would trigger certain punitive consequences based on an analysis of its behavior in terms of a pre-determined deductive definition of "terrorism," as was proposed in several bills in the 99th Congress.⁷³ Such a definition, even if it could be crafted so as to avoid being facially applicable to the actions of numerous governments upon which the United States would certainly not wish to impose sanctions of any type,⁷⁴ would serve only to divert attention from the real to the semantic: legislators, commentators and policymakers would be led to argue over whether country X's actions came under the wording of the definition instead of considering whether it was in the foreign policy interests of the United States to apply sanctions, and if so of what type, against country X. Current law provides ample authority for the U.S. Government to apply a wide range of sanctions against terrorism-supporting countries with the needed flexibility. Accordingly, an overall deductive definition of terrorism as a legislative basis for the imposition of such sanctions appears unnecessary and undesirable.

IV. CONCLUSION

The search for an authoritative, single legal definition of terrorism has gone on for at least the past fifty years at the international level, and for almost a decade in the United States, without reaching its goal. But in both these settings, the construction of legal mechanisms that can be used to suppress terrorism has proceeded despite

ident to "ban the importation into the United States of any good or service from any country which supports terrorism or terrorist organizations or harbors terrorists or terrorist organizations"); Export Administration Act of 1979, as amended, § 6(j), 50 U.S.C. App. § 2405(i) (1982) (requiring notification of congressional committees prior to approval of license for exports to countries that have repeatedly provided support for acts of international terrorism, where such exports would make a significant contribution to that country's military potential or would enhance its ability to support acts of terrorism); Foreign Assistance Act of 1961, as amended, § 620A, 22 U.S.C. § 2371 (1982) (prohibiting various forms of foreign assistance to countries that grant sanctuary from prosecution to any individual or group which has committed an act of international terrorism or otherwise supports international terrorism); Trade Act of 1974, § 502(b)(7), 19 U.S.C. § 2462(b)(7) (1982) (requiring that the President not designate a country as a "beneficiary developing country" for purposes of the Generalized System of Preferences if such country "aids and abets, by granting sanctuary from prosecution to, any individual or group which has committed an act of international terrorism"); Omnibus Diplomatic Security and Antiterrorism Act of 1986, *supra* note 47, § 509 (prohibiting export of items on the United States Munitions List to countries which have repeatedly provided support for acts of international terrorism).

73. See *supra* notes 41-44 and accompanying text.

74. FISA-derived definitions such as those in S. 1941 or S. 2335 (*supra* notes 41-42) clearly would not pass even this initial test; under those broad standards many of the world's governments, perhaps even including that of the United States, would have to be said to engage in "terrorist" behavior from time to time.

this failure, in effect ignoring the lack of an overarching deductive definition and focusing instead on specific categories of criminal acts — building from the bottom up, as it were, a structure of legal authority available for use against those who commit terrorist acts. The evident conclusion is that a deductive legal definition is not really necessary. Indeed, it is not clear that such a definition would even be beneficial. In the international context, given the intractable conceptual and political differences among states on this issue, it would be at best a watered-down, papered-over, exception-ridden orphan whose main practical result would provide a further basis for dispute and invective at the United Nations. In the U.S. context, it would in the penal area add little if anything to the federal prosecutor's arsenal, severely complicate the prosecutorial task, and be useless in securing international extradition; and in the foreign policy area, would only restrict needed executive branch flexibility and engender sterile debates over formulas instead of substance.

The fundamental problem with the deductive approach was elucidated definitively by the late Professor Richard Baxter: "We have cause to regret that a legal concept of 'terrorism' was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose."⁷⁵ This is not to say that — particularly in the international setting — the inductive approach represents the best of all possible worlds, or that the deductive approach can be discarded without sacrifice. The problem with the inductive method, from the viewpoint of counter-terrorism, is its lack of specific focus on terrorism *per se*. Not all hijackings, sabotages, attacks on diplomats, or even hostage-takings are "terrorist"; such acts may be done for personal or pecuniary reasons or simply out of insanity. The international legal instruments that address these acts are thus in a sense "overbroad" themselves: the attack of an enraged spouse on a philandering diplomat who has been cheating with the former's partner is hardly of the same international significance as the assassination of the Ambassador by militant separatists.⁷⁶ Such diffuseness tends to undermine the moral and political force of these instruments as a counter-terrorism measure. This feature is also, however, precisely what renders the instruments facially neutral and thereby permits them to be concluded in the first place by a disparate and fractious international community. In the construction of anti-terrorist legal mechanisms, as in so many other enterprises, the best may indeed be the enemy of the good.

75. Baxter, *A Skeptical Look at the Concept of Terrorism*, 7 AKRON L. REV. 380 (1974), quoted in J. MURPHY, *supra* note 16, at 3.

76. This problem has somewhat less weight in the area of unlawful interference with international civil aviation, presumptively an act of international significance whether "terrorist" or not.

